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2 **UNITED STATES DISTRICT COURT**

3 EASTERN DISTRICT OF CALIFORNIA

4
5 BARRY LOUIS LAMON,

6 Plaintiff,

7 v.

8 MCTAGGART, *et al.*,

9 Defendants.

Case No. 1:22-cv-01421-ADA-BAM (PC)

ORDER DENYING PLAINTIFF'S MOTION
TO SUBSTITUTE MICHAEL TILLERY FOR
DEFENDANT TILLERY, WITHOUT
PREJUDICE, FOR FAILURE TO
EFFECTUATE PERSONAL SERVICE

(ECF No. 35)

**Motion for Substitution of Defendant Tillery
Due: January 9, 2024**

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12 Plaintiff Barry Louis Lamon ("Plaintiff") is a state prisoner proceeding *pro se* in this civil
13 rights action pursuant to 42 U.S.C. § 1983. This action was removed from Kings County
14 Superior Court on November 3, 2022. (ECF No. 1.) The second amended complaint has not yet
15 been screened.

16 On October 11, 2023, Defendants filed a status report indicating that Defendant Tillery's
17 next of kin, Michael Tillery, was served with the notice of suggestion of death on October 3 in
18 accordance with Federal Rule of Civil Procedure 4(e)(2). (ECF No. 33.) The status report and
19 proof of service on Michael Tillery were also served on Plaintiff on October 11, 2023. (*Id.* at 5.)
20 The Court found that the ninety-day period for filing a motion for substitution of Defendant
21 Tillery was therefore triggered as of October 11, 2023. (ECF No. 34.) The parties were directed
22 to file a motion for substitution of Defendant Tillery, and to personally serve the motion on the
23 non-party successor or representative, on or before January 9, 2024. (*Id.*)

24 On October 27, 2023, Plaintiff filed a notice of motion to substitute Michael Tillery for,
25 and instead of, Defendant Tillery. (ECF No. 35.) The attached proof of service by mail indicates
26 that Plaintiff served a copy of the motion on Michael Tillery by United States Mail. (*Id.* at 3.)
27 Defendants did not file a response, and the deadline to do so has expired. The motion is deemed
28 submitted. Local Rule 230(l).

As previously explained, because Defendant Tillery's successor is not yet a party to this action, all filings and motions regarding his substitution for Defendant Tillery must be personally served. Service by United States Mail is not sufficient to complete personal service. The Court notes that although Plaintiff is not proceeding *in forma pauperis* in this action, he may file a request for a court order that personal service be made by the United States Marshals Service pursuant to Federal Rule of Civil Procedure 4(c)(3).

As Plaintiff has not personally served the motion for substitution on the non-party successor or representative of Defendant Tillery as required by Federal Rule of Civil Procedure 4, nor has he requested personal service be made by the United States Marshal pursuant to Rule 4(c)(3), the motion is denied, without prejudice. Any motion for substitution, made by any party, may still be filed on or before January 9, 2024. **The motion must be personally served on the non-party successor of Defendant Tillery, or accompanied by a request for personal service by the United States Marshals Service.**

Based on the foregoing, the Court HEREBY ORDERS as follows:

1. Plaintiff's motion to substitute Michael Tillery for Defendant Tillery, (ECF No. 35), is DENIED, without prejudice, for failure to effectuate personal service;
2. Any motion for substitution of Defendant Tillery, made by any party, SHALL be filed and served on all parties and personally served on the non-party successor or representative of Defendant Tillery, on or before **January 9, 2024**; and
3. **If no motion for substitution of Defendant Tillery is filed by any party on or before January 9, 2024, Defendant Tillery will be dismissed from this action pursuant to Federal Rule of Civil Procedure 25(a)(1).**

IT IS SO ORDERED.

Dated: November 29, 2023

/s/ Barbara A. McAuliffe
UNITED STATES MAGISTRATE JUDGE